Hongkong Bank (M) Bhd v Percetakan Nasional (M) Bhd

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO S5-24-727 OF 1998
JAMES FOONG J
4 MARCH 1999

Public Authorities — *Government Printer — Unclaimed monies — Publication in Gazette — Copy of unclaimed monies in register forwarded to Government Printer as required by s 10(2) of the Unclaimed Monies Act 1965 — Government Printer now a privatised legal entity — Whether bound by s 10(2) of the Unclaimed Monies Act 1965 not to charge fees*

As required by s 10(2) of the Unclaimed Monies Act 1965 ('the Act'), the plaintiff, a bank, forwarded to the defendant, the Government Printer, a copy of all unclaimed monies in its register for the purposes of advertisement in the Gazette. The plaintiff was charged RM31,600 for the publication and paid under protest. Although Bank Negara, when consulted, was of the opinion that no payment was required for the publication, the defendant refused to refund the money to the plaintiff. The plaintiff applied to the High Court for a declaration that the defendant was not entitled to payment for the publication as s 10(2) of the Act states that no fee shall be payable for such advertisement in the Gazette. The plaintiff also sought for an order for a refund of the money paid with interests and costs. The defendant's defence was that it had become an incorporated legal entity of limited liability by a privatisation agreement with the Government of Malaysia. By the terms of the privatization agreement, the defendant had taken over from the government printing department the operation, staff and assets. However, there was no provision for any free publication. Therefore, the defendant contended that as a private enterprise, it was allowed to charge for printing and publishing of material forwarded by the plaintiff in the Gazette. The plaintiff however further argued that since the agreement defeats the law laid out under s 10(2) of the Act, s 24(b) of the Contracts Act 1950 would render the privatization agreement void. The third party, the Kementerian Kewangan Malaysia, supported the plaintiff's application and informed the court that the post of Director General of Government Printer, which was to be supplied with such register of unclaimed monies under the Act, no longer existed.

Held, disallowing the application:

(1) The defendant was a separate legal entity and as they had entered into an agreement with the Government of Malaysia, their only obligation is towards the Government. They were not bound by s 10(2) of the Act and they could enter into any contract with any party on its operation, subject to the terms of the privatization agreement (see p 476G–H).

(2) The defendant had every right to request a fee for their service. If this offer had not been taken up, then no contract would have been formed. Though the payment of the fee was made under protest, a legally binding agreement came into existence. The contract was properly made and the defendant had not breached any of the terms of the agreement. As such, there was no justification under the law to order the return of the consideration (see pp 476H–477A).

(3) With regard to plaintiff's argument that since the privatization agreement defeats the law laid out under s 10(2) of the Act, s 24(b) of the Contracts Act 1950 renders the privatization agreement void, on the facts, the court was not called upon to declare the privatization agreement void (see p 475G–I).

(4) The plaintiff's submission that the defendant had assumed the role of the Director General of Government Printer and was required to advertise the material free of charge could not be accepted because this designation was too specific for it to be implied that the post could be assumed by an individual or firm from the private sector; rather, it has all the connotations of an officialdom which is bestowed on government officials appointed to head a particular government department. It was not appropriate for the administrative authorities of the government not to appoint any person to the post or to abolish the post, as this would be contrary to the express provision of the law in s 10(2) of the Act (see p 476C–F).

Per curiam:

The obligation of the plaintiff under s 10(2) of the Act was merely to forward to the Director General of the Government Printer the relevant material. There is no further duty to ensure it was advertised. Since the post of the Director General of the Government Printer has been abolished, the material should have been forwarded to the Chief Secretary to the Government, who should re-appoint someone to the post, or request a relevant ministry of the Government, or through its own office forward the matter to the defendant for printing; and no fee can be charged to the plaintiff for printing. It would be then up to the Government of Malaysia and the defendant to determine whether any fee be paid under the terms of the privatization agreement (see p477B–E).

[Bahasa Malaysia summary

Seperti yang diperuntukkan oleh s 10(2) Akta Wang Tak Dituntut 1965 ('Akta tersebut'), plaintif, sebuah bank, telah menghantar kepada defendan, Percetakan Kerajaan, sesalinan daftar semua wang yang tak dituntut untuk pengiklanan dalam Warta Kerajaan. Plaintif telah dikenakan bayaran sebanyak RM31,600 untuk penerbitan dan

telah membuat bayaran dengan bantahan. Walaupun apabila Bank Negara dalam memberi nasihat berpendapat bahawa tiada bayaran harus dikenakan untuk penerbitan tersebut, defendan enggan memulangkan wang tersebut kepada plaintif. Plaintif telah memohon kepada mahkamah untuk pengisytiharan bahawa defendan tidak berhak untuk menerima bayaran untuk penerbitan tersebut kerana s 10(2) Akta tersebut menyatakan bahawa tiada bayaran harus dikenakan untuk pengiklanan sebegitu dalam Warta Kerajaan. Plaintif juga memohon perintah untuk pemulangan wang bersama faedah dan kos. Pembelaan defendan adalah bahawa defendan telah menjadi sebuah entiti yang diperbadankan di sisi undang-undang yang mempunyai tanggungan terhad melalui perjanjian penswastaan dengan Kerajaan Malaysia. Menurut terma perjanjian penswastaan, defendan telah mengambilalih pengendalian, pekerja dan harta jabatan percetakan kerajaan. Akan tetapi, tiada peruntukan untuk apa-apa penerbitan percuma. Oleh kerana itu, defendan berhujah bahawa sebagai sebuah perusahaan swasta, mereka berhak untuk mengenakan bayaran untuk pencetakan dan penerbitan bahan-bahan yang telah dihantar oleh plaintif dalam Warta Kerajaan. Namun demikian plaintif terus berhujah bahawa oleh kerana perjanjian tersebut menggagalkan undang-undang yang tertera di bawah s 10(2) Akta tersebut, s 24(b) Akta Kontrak 1950 akan menyebabkan perjanjian penswastaan tersebut terbatal. Pihak ketiga, Kementerian Kewangan Malaysia, telah menyokong permohonan plaintif dan memberitahu mahkamah bahawa jawatan Ketua Pengarah Percetakan Kerajaan, yang harus diberikan daftar wang tak dituntut di bawah Akta, tersebut tidak wujud lagi.

Diputuskan, menolak permohonan:

(1) Defendan adalah entiti undang-undang berasingan dan oleh kerana mereka telah mengikat perjanjian dengan Kerajaan Malaysia, kewajipan mereka hanyalah kepada Kerajaan Malaysia. Mereka tidak terikat dengan s 10(2) Akta tersebut dan boleh memasuki sebarang perjanjian dengan mana-mana pihak dalam operasinya, tertakluk kepada syarat-syarat perjanjian penswastaan (lihat ms 476G–H).

(2) Defendan mempunyai hak sepenuhnya untuk meminta bayaran untuk perkhidmatannya. Jika tawaran tersebut tidak diambil, maka tiada kontrak akan terbentuk. Walaupun pembayaran telah dibuat dengan bantahan, sebuah perjanjian terikat di sisi undang-undang telah wujud. Kontrak tersebut telah dibuat dengan betul dan defendan tidak memungkiri apa-apa syarat perjanjian. Justeru itu, tiada justifikasi di bawah undang-undang untuk memerintahkan pemulangan balasan tersebut (lihat ms 476H–477A).

(3) Bekenaan dengan hujah defendan bahawa oleh kerana perjanjian penswastaan tersebut menggagalkan undang-undang yang tertera di bawah s 10(2) Akta tersebut, s 24(b) Akta Kontrak 1950 menyebabkan perjanjian penswastaan tersebut terbatal,

berdasarkan fakta, mahkamah tidak diminta untuk mengisytiharkan perjanjian penswastaan tersebut terbatal (lihat ms 475G–I).

(4) Hujah plantif bahawa defendan telah menjawat jawatan Ketua Pengarah Percetakan Negara dan harus mengiklankan bahan tersebut tanpa bayaran tidak boleh diterima kerana jawatan ini terlalu terperinci dan tidak boleh diambil secara tersirat bahawa jawatan ini boleh dijawat oleh seseorang ataupun sesebuah firma dari sektor swasta; sebaliknya, ia mempunyai segala konotasi suatu jawatan rasmi yang diberi kepada pegawai kerajaan yang dilantik untuk mengetui sesebuah jabatan kerajaan. Adalah tidak sesuai untuk pentadbiran kerajaan untuk tidak melantik sesiapa untuk jawatan itu ataupun untuk memansuhkan jawatan itu, kerana ini bertentangan peruntukan nyata undang-undang di s 10(2) Akta tersebut (lihat ms 476C–F).

Per curiam:

Kewajipan plaintif di bawah s 10(2) Akta tersebut adalah hanya untuk manghantar kepada Ketua Pengarah Percetakan Kerajaan bahan-bahan relevan. Tidak ada tanggungjawab selanjutnya untuk memastikan bahawa ia diiklankan. Oleh kerana jawatan Ketua Pengarah Percetakan Kerajaan telah dimansuhkan, bahan tersebut seharusnya dihantar ke Ketua Setiausaha Kerajaan, yang harus melantik seorang ke jawatan tersebut ataupun untuk meminta jabatan kerajaan yang relevan, atau melalui pejabatnya menghantar bahan tersebut kepada defendan untuk pencetakan; dan tiada bayaran boleh dikenakan terhadap plaintif untuk pencetakan. Adalah terpulang kepada Kerajaan Malaysia dan defendan untuk memutuskan sama ada apa-apa bayaran harus dibayar di bawah syarat-syarat perjanjian penswastaan (lihat ms 477B–E).]

Notes

For cases on public authorities generally, see 10 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 1381–1462.

Legislation referred to

Contracts Act 1950 s 24(b)
Unclaimed Monies Act 1965 s 10(2)

Sanjay Mohanasundram (Lee Hishamuddin) for the plaintiff.
HP Ting (SK Ng with him) *(Amin Tan & Co)* for the defendant.
Khatijah Idris (Kementerian Kewangan Malaysia) for the third party.

James Foong J:

The issue

The plaintiff is a bank. On or about 26 March 1996, as required by s 10(2) of the Unclaimed Moneys Act 1965 ('the Act'), it forwarded to the

defendant a copy of all unclaimed moneys in its register of that period ('the material') for the purpose of advertisement in the Gazette. It received a reply from the defendant on 27 April 1996 to say that the charges involved for such publication was RM31,600. This was paid under protest by the plaintiff for it claimed that under s 10(2) of the Act 'no fee shall be payable' for such publication. A clarification was sought by the plaintiff through its association ('the Association of Banks in Malaysia') from Bank Negara on whether the defendant can charge such fee for the publication of the material. Though the reply from Bank Negara seems to indicate that no such payment is required, the defendant refused to refund to the plaintiff the sum so paid under protest. Dissatisfied, the plaintiff now seeks from this court:

(1) a declaration that upon a true construction of s 10(2) of the Act, the defendant is not entitled to claim the costs of publication and advertisement in the Gazette of the copy or copies of entries of unclaimed monies held by the plaintiff;

(2) an order that the defendant do pay the plaintiff from the date of the order made herein, the sum of RM31,600 together with interest thereon at the rate of 8 per cent per annum from 10 July 1996; and

(3) costs.

Pursuant to an order to issue third party notice, the Kementerian Kewangan Malaysia joined in this proceeding as a third party. By the contents of the affidavit of its legal officer, affirming for and on behalf of the Ministry, the third party seems to support this plaintiff's application.

For the defendant, the defence is rather a simple one. It asserted that it is an incorporated legal entity of limited liability. Except for a privatization agreement ('the privatisation agreement') dated 30 December 1992 with the Government of Malaysia to take over and carry out the operations of printing, publication, production and distribution of all documents previously done by the Government Printer ('the operations'), it is not a government department, nor is its chief executive or operating officer the Director General of Government Printer at any material time. As a private enterprise, it is allowed to charge for printing and publishing of the material forwarded to it by the plaintiff for advertisement in the Gazette. It then proceeded to point out that even under the privatization agreement, all materials forwarded to it for the operation by the Government of Malaysia, through its ministries and agencies, are charged on a scale fee set out in the agreement and paid for by the authorities.

Analysis

From the above, it is obvious that someone in the course of this privatization exercise had overlooked s 10(2) of the Act, by not making any provision in the privatization agreement to accommodate the publication of the material without charge. This court is now called upon to resolve this muddle through the prayers sought in this application. To approach it, I reckon that the first step is to examine s 10(2) of the Act. It states:

> The company or firm shall annually, during the month of March, forward to the Director General of Government Printer a copy of all such entries in the register, which shall include unclaimed moneys held up to the end of February of that year, for .

Then upon perusal of the terms of the privatization agreement, I discovered that the defendant has taken over from the government printing department not only the operation, but also its staff and assets. In consideration for this, the defendant, inter alia, agrees to carry out the operation required by the government ministries, departments and agencies for a fee; the amount and the rate are based on a certain agreed formula. There is no provision in this privatization agreement for any free publication. Due to this arrangement, this court is informed by the third party that even the post of Director General of Government Printer no longer exists.

Though recognizing this situation, the plaintiff in its determination to convince this court that the defendant should advertise the material in the Gazette without charging any fee advanced three contentions. The first is the existence of a clause ('cl 18') in the privatization agreement which states that the defendant must 'comply with the provisions of all Acts, Ordinances, By-Laws, Regulations and Rules for the time being in force in relation to the Privatized Operations.' Such expression, in their opinion, should bind the defendant to adhere to s 10(2) of the Act.

I am not convinced by this proposition. Clause 18 of the privatization agreement is under the section which bears the heading of 'Licences, etc.' Ensuing clauses immediately after this title set out stipulations for the defendant to apply for all licences and approvals to carry out the operation. Thus when one reads cl 18, which follows immediately after these, it must be in reference to the application of licences, permissions and approvals to carry out the operation. It cannot be interpreted in isolation to cover a general situation. After all, the law implies that everyone must comply with all laws of the land and there is no necessity to repeat this in an agreement.

Plaintiff's counsel then drew my attention to s 24(b) of the Contracts Act 1950. It states:

> The consideration or object of an agreement is lawful, unless —
>
> (b) it is of such nature that, if permitted, it would defeat any law.

According to him, by the defendant's insistence to charge for the advertisement of the material to be advertised in the Gazette, it would defeat the law laid out under s 10(2) of the Act thereby rendering the privatization agreement void.

I do not see the relevance of this in these present circumstances. This court is not called upon to declare the privatization agreement between the defendant and the Government of Malaysia void; for s 24 of the Contracts Act provides that: 'Every agreement of which the object or consideration is unlawful is void.' The plaintiff in fact, is not at all concerned with the arrangement between the Malaysian Government and the defendant to carry out the operation. All it wanted was to have the material advertised in the Gazette by whomever authorized to do so at no cost. And as candidly

expressed by the plaintiff, it does not wish to fall foul with the law for s 10(5) of the Act provides:

> In the event of failure to keep or to enter all unclaimed moneys in such register or *to forward for advertisement* such copy thereof or of failure to lodge copies thereof with the Registrar, the company and in a company or firm every officer responsible therefor shall be guilty of an offence punishable with a fine not exceeding three thousand ringgit and thereafter with a further fine not less than fifty ringgit and not more than one hundred ringgit for every day during which such default or refusal continues. (Emphasis added.)

The next attempt by the plaintiff's counsel is to convince me that by the nature of the operation under the privatization agreement, the defendant has assumed the role of the Director General of Government Printer under the Act; thus it is required to advertise the material in the Gazette free of charge. Supporting this, he cited the Interpretation Acts 1948 and 1967 where:

> 'Government Printer' includes any printer authorized, either generally or in a particular case or class of cases, to print Acts, Enactments, Ordinances or any other written laws.

I may agree that by the features of the operation, the defendant can be classified as Government Printer, but s 10(2) of the Act speaks of a person in the form of the Director General of Government Printer. To my mind, the description of this personnel is too specific to be implied that it can be assumed by an individual or firm from the private sector. This designation has all the connotations of an officialdom which is bestowed on government officials appointed to head a particular government department. The administrative authorities of the government may think it appropriate not to appoint any person to this post or may even have abolished it in view of the privatisation agreement, but can this be lawful when express provision of the law, as in this case under s 10(2) of the Act, specify such an appointment? I do not think so. Not even the court has such power to change the wishes of Parliament.

Findings

I am more inclined to accept the submission of the defendant. It is a separate legal entity created under the provisions of the Companies Act. Though it has an agreement with the Government of Malaysia to carry out the operation, its obligation is only towards the Government. Being a separate entity, it can enter into any contract with any party on its operation but, of course, subject to the terms of the privatization agreement. By this, it is also entitled to negotiate any terms for its service. It is not bound by s 10(2) of the Act. Thus, when the plaintiff forwarded the material to the defendant for advertisement in the Gazette, the defendant had every right to request a fee for their service. If this offer was not taken up, then no contract was formed. But the plaintiff chose to accept it. Though the payment of the consideration was made under protest, a binding legal agreement came into existence. Now to request this court to return this consideration upon a contract properly made, and when the defendant had

not breached any of the terms of the agreement then, there is no justification under the law to grant it. For these reasons, I hereby disallow this plaintiff's application with costs to the defendant.

Of course, more important to the plaintiff now is: what it must do in the future relating to similar matters to the material to be advertised in the Gazette. My view is that s 10(2) of the Act merely imposes a duty on the plaintiff to 'forward to the Director General of Government Printer' such matters. As long as this is complied with, there is no further obligation on the part of the plaintiff, by the provision of this law, to ensure that the matter is advertised. Of course, the plaintiff will ask: to whom shall I forward the matter to when, as admitted by the third party, the post of the Director General of Government Printer is abolished? My answer is firstly that such post cannot be erased by the administrative authorities when it is specified in an Act of Parliament. If it is, then the matter should be forwarded to the chief administrative officer of the Government in the form of the Chief Secretary to the Government. It is for him to either re-appoint someone to the post of Director General of Government Printer, or request a relevant ministry of the Government, or through its own office forward the matter to the defendant for printing; and no fee can be charged to the plaintiff for such advertisement. It is then up to the Government of Malaysia and the defendant to determine whether any fee to be paid under the terms of the privatization agreement. Of course there is always the avenue of requesting the law to be amended, but the form and manner of which is certainly beyond the purview of this court to venture.

Plaintiff's application disallowed.

Reported by Lynette Tan Ping